## BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| **JENNIFER A. SCHULTEJANS** | ) | |
| Claimant | ) | |
| v. | ) | |
| | ) | Docket No. 1,072,647 |
| **ROBERT DURBIN, DDS** | ) | |
| **d/b/a TODAY'S DENTISTRY** | ) | |
| Respondent | ) | |
| and | ) | |
| | ) | |
| **CINCINNATI INDEMNITY COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier (respondent) request review of the October 1, 2015, preliminary hearing Order entered by Special Administrative Law Judge (SALJ) Jerry Shelor. Claimant appears by Jeff K. Cooper of Topeka, Kansas. Respondent appears by Christopher J. McCurdy of Overland Park, Kansas.

### ISSUES

In the preliminary Order, the SALJ awarded authorized medical treatment with Dr. Jeffrey Randall. In another order, also dated October 1, 2015, the SALJ ordered a neutral medical evaluation by Dr. Lowry Jones.

Respondent argues claimant did not provide timely and proper notice, failed to prove she sustained personal injury by repetitive trauma arising out of and in the course of her employment, and did not prove the alleged repetitive trauma was the prevailing factor causing her injury. Respondent also maintains the SALJ exceeded his jurisdiction by issuing the Order for medical treatment and, at the same time, entering an order for a neutral medical evaluation. Respondent requests reversal of the SALJ's preliminary hearing Order.

Claimant argues the evidence establishes she sustained personal injury by repetitive trauma, and provided timely and sufficient notice on December 1, 2014. Claimant requests the SALJ's preliminary hearing Order be affirmed.

No application for Board review of the order for the neutral medical examination was filed.

The issues are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment, including whether her alleged repetitive trauma was the prevailing factor causing her injury?

2. Did claimant provide timely and proper notice of her injury by repetitive trauma?

3. Did the SALJ exceed his jurisdiction in ordering both an authorized treating physician and a different physician to perform a neutral medical evaluation.

## FINDINGS OF FACT

### Testimony of Claimant

Claimant is 50 years old and has been a dental hygienist since 1986. She has worked for respondent for over 21 years and continues to be so employed. Claimant normally worked 24 hours per week, but in December 2014, she reduced her weekly hours to 16 for reasons unrelated to this claim.

To perform her job, claimant asserted she must lean over and reach across patients, in what she described as "compromised positions,"[1] with her arms out away from her body, while engaging in pushing and pulling movements for eight hours per day. Claimant, who is right hand dominant, believes such activities placed stress on her right shoulder.

Claimant testified she first noticed problems with her right shoulder in August or September 2014. When asked if she talked to anyone at respondent about her symptoms, claimant responded she talked initially to Krista Booth sometime in November 2014. According to claimant, Krista Booth was "a front desk office person [who] kind of helps out with the office management position."[2] Claimant testified Ms. Booth was her supervisor "at that particular day."[3] Claimant did not know if she told Ms. Booth her injury was to her hand, wrist or shoulder, or all of them. Claimant asserted she did not specify to Ms. Booth that her pain was work-related.

Claimant testified she told the office manager, Norma Startup, that her shoulder was hurting because of her work and asked Ms. Startup about looking into workers compensation. According to claimant, Ms. Startup said she did not think claimant's pain

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[1] P.H. Trans. at 8.

[2] *Id.* at 9.

[3] *Id.*

was work related, but in a subsequent conversation, Ms. Startup told claimant she would look into the matter. Claimant believes she first talked to Ms. Startup before she saw Dr. Randall on December 1, 2014, but was not certain when her discussions with Ms. Startup occurred. Claimant also testified she talked to Ms. Startup on December 1, 2014, because she went to work after leaving Dr. Randall's office and then told Ms. Startup the doctor said her pain was work-related from repetitive motion.

Neither Ms. Booth nor Ms. Startup asked claimant to fill out an accident report. Claimant received a denial letter from respondent's insurance carrier dated January 13, 2015, regarding a December 1, 2014, date of loss. Claimant filled out an application for hearing on January 26, 2015, which was received by respondent on January 28, 2015.

Claimant believes her work caused her shoulder problem. She testified that when working, she used her right shoulder and her entire right arm. Claimant denied other injuries to her right shoulder. However, claimant was shown medical records reflecting she had a right shoulder injection 10 years before, but claimant asserted she did not recall that treatment. Claimant also testified she remembered having a right shoulder injection from Dr. Randall in 2010, but said she does not remember Dr. Randall diagnosing a right shoulder rotator cuff tear in October 2010.

The records of claimant's primary care physician, Dr. Jennifer L. Scheid, revealed she complained of right shoulder pain on December 10, 2012, and December 16, 2013. According to claimant, she does not recall making those complaints. Claimant testified she also does not recall making complaints to Dr. Scheid about pain and tightness in her right shoulder and neck at her annual physical on December 16, 2013. Claimant asserted the pain and stiffness she reported to her personal physician was the same pain she experienced working for respondent.

Claimant saw Dr. Jeffrey C. Randall on her own and claimant's counsel sent her to Drs. Edward J. Prostic and Prem Parmar. Dr. Parmar's report does not address whether claimant's condition was work related. Claimant testified Dr. Parmar spent only five minutes with her and he did not know what a dental hygienist does. Dr. Erich J. Lingenfelter examined claimant at respondent's request.

Respondent provided no treatment for claimant's alleged injury. Claimant is asking that Dr. Randall be authorized for treatment. Claimant had a workers compensation claim for her right shoulder 20 years ago while working at Gage Dental Group, but she believed that claim was for tendonitis in her hand and wrist.

Claimant continues to work 16 hours per week performing her regular job duties. She asserted she experiences pain in her right shoulder when reaching across patients and engages in pushing and pulling motions. According to claimant, she tries to modify the way she performs her job and has learned to deal with the discomfort.

**Testimony of Norma Startup**

Ms. Startup testified that when someone reports a workers compensation injury, she calls the insurance carrier to report the claim. The carrier then sends an accident report to be completed by the claimant.

According to Ms. Startup, claimant came to respondent to pick up her paycheck on December 30, 2014, at which time she told Ms. Startup she had a workers compensation claim. Ms. Startup testified she was not aware of claimant's shoulder complaints before that date, and does not recall a conversation with claimant on December 1, 2014, about her appointment with Dr. Randall.

When claimant told Ms. Startup about her workers compensation claim, she told claimant she thought claims had to be reported within 48 hours after an accident. Ms. Startup also told claimant she would check with the insurance company, but she thought it was too late to make a claim. Ms. Startup notified the insurance company about claimant's injury on January 5, 2015, and the carrier denied it on January 13, 2015.

**Testimony of Krista Booth**

Krista Booth remembers talking with claimant on October 29, 2014, about pain in her arm. Ms. Booth does not recall what part of claimant's arm was painful. Claimant told Ms. Booth her complaints were work related, but did not describe a time, place or the particulars of a workplace accident. In the October 29, 2014, discussion, claimant told Ms. Booth that her arm was hurting and she no longer wished to work on Wednesday mornings. Claimant did not ask Ms. Booth for workers compensation benefits. Ms. Booth testified she was first aware claimant was seeking workers compensation benefits after claimant talked to Ms. Startup on December 30, 2014.

**Preliminary Hearing Exhibits**:

Exhibit 1: Dr. Prostic's report of a April 14, 2015, examination. Dr. Prostic opined claimant sustained repetitious minor trauma during the course of her employment through December 23, 2014, and such repetitive trauma was the prevailing factor causing claimant's injury, medical condition and need for treatment.

Exhibit 2: Medical records of Dr. Jeffrey Randall, commencing on December 1, 2014, and ending on January 28, 2015. Before the January 28, 2015, chart entry, the history documented in Dr. Randall's records does not suggest any causal connection between claimant's work and her right shoulder issues. Dr. Randall did not express opinions about causation and prevailing factor.

Exhibit 3: A letter from the carrier to claimant dated January 13, 2015, denying a claim for benefits with a date of loss of December 1, 2014.

Exhibit 4: A claim letter from claimant's counsel to respondent dated January 26, 2015, and a certificate of certified mail and return receipt showing the letter was delivered to respondent on January 28, 2015.

Exhibit A: Treatment records from Dr, Randall, dated December 3, 2010, and December 13, 2010, reflecting pre-injury right shoulder complaints and treatment.

Exhibit B: A report of an examination conducted by Dr. Scheid dated December 10, 2012, indicating claimant complained of tension in her neck and shoulders.

Exhibit C: A report of an examination conducted by Dr. Scheid dated December 16, 2013, indicating claimant gave a history of tightness in her shoulder and neck, mainly from her work.

Exhibit D: A chart entry of Dr. Peter S. Lepse dated September 7, 1993, reflecting diagnoses of right shoulder rotator cuff tendinitis versus biceps tendinitis, and right wrist overuse syndrome.

Exhibit E: A report dated February 9, 2015, addressed to claimant's counsel from Dr. Parmar, indicating claimant's chief complaint was right shoulder pain since about December 2014 with no specific injury. There was no history that claimant's right shoulder complaints were associated with her work. Dr. Parmar diagnosed right shoulder impingement with some partial thickness rotator cuff tearing. The doctor did not address causation and prevailing factor.

Exhibit F: A report of Dr. Lingenfelter, who examined claimant on September 23, 2015. The report indicates claimant worked as a dental hygienist, which requires claimant to reach out of the plane of her body and also perform "typical dental hygienist work." Claimant reported she began to having shoulder pain perhaps a couple of months before December 2014. The doctor's diagnosis was calcific tendinitis, which he opined was not the prevailing factor causing her injury.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b provides in relevant part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides in relevant part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-516 provides in relevant part:

(a) In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determinations.

K.S.A. 2013 Supp. 44-520 provides in relevant part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> . . .
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

There is no merit to respondent's position the SALJ exceeded his authority by entering both the Order for medical treatment with Dr. Randall and a separate order for a neutral medical evaluation with Dr. Lowry Jones. Respondent claims the SALJ thereby abused his discretion because the two orders are "inconsistent and competing/conflicting."[4] However, respondent cites no authority, statutory or otherwise, supporting the notion that the SALJ exceeded his jurisdiction, and this Board Member can find none. The SALJ had the authority to order medical treatment pursuant to K.S.A. 44-534a and the authority to order an independent medical evaluation pursuant to K.S.A. 44-516.

Regarding notice, the undersigned Board Member finds claimant provided respondent with timely and sufficient notice. The precise date of injury to be assigned in this claim is problematic because it does not fit comfortably within any of the four categories of K.S.A. 2012 Supp. 44-508(e). Claimant argues she provided notice to Ms. Startup when she went to respondent's office following her appointment with Dr. Randall on December 1, 2014. Respondent contends, based on the testimony of Ms. Booth and Ms. Startup, the date of notice was December 30, 2014.

This Board Member finds the date of claimant's injury by repetitive trauma was December 1, 2014, and that notice was provided to respondent on October 29, 2014. Claimant's testimony clearly indicates she does not have the ability to remember precise dates, times and the contents of specific conversations. For that reason, her testimony is less than reliable. However, the testimony of Ms. Booth reflects a better recollection and is accordingly entitled to greater weight.

Krista Booth remembered talking with claimant on October 29, 2014, about pain in claimant's arm. According to Ms. Booth, claimant told Ms. Booth her complaints were work related. In the October 29, 2014, discussion, claimant told Ms. Booth that because her arm was hurting, she no longer wished to work on Wednesday mornings.

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[4] Respondent's Brief at 11 (filed Oct. 26, 2015).

The evidence is undisputed Ms. Booth was a supervisor. Respondent was made aware of the person claiming injury on October 29, 2014. The place of the repetitive trauma was obviously respondent's office, where claimant had worked for 21 years. There is no evidence claimant performed her work elsewhere. Claimant's repetitive trauma did not have a specific date and time since the injury occurred over time while claimant performed her job for respondent. It was apparent from claimant's discussion with Ms. Booth that she was claiming a work related injury. Notice can be provided before a legal date of injury by repetitive trauma.[5]

Although the medical evidence is conflicting, claimant proved by a preponderance of the credible evidence she sustained personal injury by repetitive trauma that was the prevailing factor causing her injury, need for medical treatment and resulting disability or impairment. The nature of claimant's job, requiring working with her arms away from her body and moving her arms in pushing and pulling motions for sustained periods, placed stress on her right shoulder. It is a reasonable inference that claimant's employment caused an increased risk or hazzard of repetitive trauma, to which claimant would not be exposed in normal non-employment life, and that the increased risk or hazzard and the repetitive trauma were the prevailing factor in causing claimant's medical condition, need for medical treatment or resulting disability or impairment. Claimant believes her shoulder injury was caused by her work.

Moreover, the report of Dr. Prostic supports the finding that claimant's injury arose out of and in the course of her employment and that the prevailing factor causing claimant's injury, medical condition and disability or impairment is the repetitive trauma claimant sustained.

Dr. Lingenfelter opined claimant's condition, which he diagnosed as calcific tendinitis, is unrelated to her work. Dr. Lingenfelter seemed uncertain what caused claimant's right shoulder injury – gender, resorption of calcium buildup, age, diabetes, etc., but the doctor seems quite assured of one thing: claimant's repetitive work cannot be the cause and the prevailing factor. Although Dr. Lingenfelter says his diagnosis is clear from the MRI scan, Drs. Prostic, Parmar and Randall all reviewed the same MRI, and none of those orthopedic specialists diagnosed calcific tendinitis. The reports of Dr. Parmar and Dr. Randall contained no causation/prevailing factor opinions.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[5] *Barrett v. Wal-Mart*, No. 1,059,815, 2012 WL 6811294 (Kan. WCAB Dec. 11, 2012); *Whisenand v. Standard Motor Products, Inc.*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012).

[6] K.S.A. 44-534a.

as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

1. Claimant sustained personal injury by repetitive trauma arising out of and in the course of her employment, and such repetitive trauma was the prevailing factor causing claimant's injury, medical condition and need for treatment.

2. Claimant provided timely and proper notice of her injury by repetitive trauma.

3. The SALJ did not exceed his jurisdiction in ordering both an authorized treating physician and a different physician to perform a neutral medical evaluation.

## DECISION

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge Jerry Shelor dated October 1, 2015, is affirmed

**IT IS SO ORDERED.**

Dated this _____ day of January, 2016.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com
toni@jkcooperlaw.com

Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
cmccurdy@wallacesaunders.com

Honorable Jerry Shelor, Administrative Law Judge